Where the law has intervened to make performance of the contract impossible, the promisor is excused primarily on grounds of public policy, and not from any notion of indulgence. The rule is generally recognized, that a contract for an illegal object is void on its face; and the time fixed for performance is plainly the time at which the legality of the object is finally to be determined. Clearly, then, it is immaterial whether or not the promisor might have anticipated that the thing which he has promised to do, and which was lawful at the time he contracted, would subsequently become unlawful.[2] The absolute, arbitrary bar to the enforcement of the contract is present, irrespective of the intention or knowledge of the parties. In cases where the element of illegality is not present, because the defense interposed is impossibility due to foreign, as distinguished from domestic, law, the courts have generally refused to excuse the promisor.[3]

In contracts where performance has become impossible in fact, however, the defense is in its nature equitable, resting upon the injustice of enforcing an absolute legal obligation under all circumstances;[4] and if the impossibility might have been foreseen by the promisor, the equitable grounds upon which he claims relief must fail.[5] The importance of this distinction between impossibility in fact and impossibility in law is illustrated by a case lately decided in the United States Supreme Court. During the war between China and Japan a carrier contracted to transport copper from New York to Yokohama. The government official at Tacoma, however, refused to clear the vessel carrying the copper, on the ground that as contraband it could not legally be exported to Japan. The ship accordingly sailed without it. The following day it appeared that there was no legal objection to the exportation. It was held that the mistake of the official was no defense to the carrier in view of circumstances showing that it had taken the risk of any trouble arising from the nature of the goods. *Northern Pacific Railway Co.* v. *American Trading Co.*, 25 Sup. Ct. Rep. 84. Although the agent of the government had acted within the scope of his employment, that fact could not operate to give validity to his unauthorized act, and the breach of the contract was not due strictly to the operation of law. Consequently, since the principles of public policy upon which an illegal contract is declared void, did not apply, the promisor had no absolute defense. The case was, accordingly, determined upon the same principles as cases presenting a supervening impossibility of fact, with emphasis placed upon the assumption of risk by the promisor. Thus, if the official abuse of discretion could not have been anticipated, one so prevented from performing should have been protected. Where the defense interposed is impossibility due to foreign law, there is a situation closely analogous, and it would seem that the result should be worked out along the same equitable lines.[6]

EXEMPTION OF MUNICIPAL PROPERTY FROM STATE TAXATION. — A municipality being, within its territory, an agency of the state for the exercise of governmental functions, a general rule of exemption excludes prop-

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[2] *Cf.* Esposito *v.* Bowden, 7 E. & B. 763, 789, 790.

[3] Barker *v.* Hodgson, 3 M. & S. 267; Blight *v.* Page, 3 Bos. & Pul. 295, note *a*; Tweedie Trading Co. *v.* McDonald Co., 114 Fed. Rep. 985.

[4] 15 HARV. L. REV. 418.

[5] Jennings *v.* Lyons, 39 Wis. 553; Bryan *v.* Spurgin, 5 Sneed (Tenn.) 681.

[6] See 16 HARV. L. REV. 64.

erty held by a city for governmental purposes from state taxation, to avoid the inconsistency of the state taxing itself.[1] Accordingly, such instrumentalities of well-recognized governmental functions as city halls and court houses are nowhere taxed. Changed economic conditions, however, have enlarged the domain of municipal enterprise, and the state has seen fit to confer added power upon its municipalities. Parks, aqueducts, wharves, waterworks and lighting plants have become legitimate objects of municipal ownership; and the question arises whether such property is held for governmental purposes within the meaning of the rule of exemption. A distinction has been taken by some courts, and exemption denied to property held by a city merely for the "profit and convenience of its citizens."[2] In applying this limitation, the Court of Appeals of Kentucky lately refused to exempt bonds of a gas company acquired by the city of Frankfort in exchange for its gas plant, although the income from the bonds was used for lighting the streets. *City of Frankfort* v. *Commonwealth*, 82 S. E. Rep. 1008. A previous decision of the same court exempting a public park is distinguished on the ground that the city derived no revenue from its park.[3] It would seem, however, that the profit and convenience of the citizens of a particular community are quite as much the sole objects of a public park as of street lamps. Moreover, the city has constitutional authority to provide for street lighting. It would hardly be urged that taxes directly levied for that purpose are taxable by the commonwealth, and the means of effectuating such an object should be regulated only by the test of reasonableness.

The majority of jurisdictions have taken a broader view, and, therefore, in the absence of special statutes, municipal waterworks and lighting plants, though yielding revenue, are exempt from taxation.[4] The collection of water-rents is generally considered, not a source of private profit, but a mode of taxation.[5] To the extent that a municipality is given enlarged power to acquire and engage in industries directly for the public benefit, it is regarded as invested with so much more governmental power, in the broader meaning of the term.[6] Whatever property it acquires through taxation is exempt;[7] for, obviously, the product of one tax should not be made the subject of another. The power to levy taxes is based on the right of governmental administration and public welfare.[8] Only public purposes justify the levying of a tax, and the same test as to what constitutes public purposes should be applied in exempting property from taxation as in levying taxes for the purpose of acquiring it.

RIGHT OF INSPECTION IN SALES C. O. D. — Under ordinary circumstances, when a vendor sells and ships goods of a specified description, the vendee clearly has the right of inspection before acceptance.[1] If the goods

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[1] 1 Cooley, Taxation, 3d ed., 263 *et seq.*

[2] City of Louisville *v.* Commonwealth, 1 Duv. (Ky.) 295.

[3] *Cf.* City of Owensboro *v.* Commonwealth, 105 Ky. 344; Rochester *v.* Rush, 80 N. Y. 302.

[4] Town of West Hartford *v.* Water Com'r, 44 Conn. 360; State *v.* Toledo, 54 Oh. St. 418; Smith *v.* Mayor of Nashville, 88 Tenn. 464; Sumner County *v.* Wellington, 66 Kan. 590; *contra*, City of Covington *v.* Commonwealth, 19 Ky. Law Rep. 105.

[5] Springfield, etc., Co. *v.* Keeseville, 148 N. Y. 46.

[6] See Town of West Hartford *v.* Water Com'r, *supra*; Rochester *v.* Rush, *supra*.

[7] State *v.* Toledo, *supra*.

[8] See People *v.* Salem, 20 Mich. 452.

[1] Isherwood *v.* Whitmore, 11 M. & W. 347.